

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**C.D. BROOKS,**

**Plaintiff,**

**v.**

**JO ANNE B. BARNHART,**  
**COMMISSIONER OF SOCIAL SECURITY,**

**Defendant.**

## CIVIL ACTION

**No. 04-2526-CM**

## MEMORANDUM AND ORDER

This social security appeal is before the court on the magistrate judge's Report and Recommendation to reverse and remand the Commissioner's denial of benefits. Defendant timely objected to the Report and Recommendation (Doc. 17). The facts and law are accurately set forth in the Report and Recommendation, and the court will not repeat them here. In reviewing a magistrate judge's Report and Recommendation, the district court makes a "*de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). In the court's review, the court must "consider relevant evidence of record and not merely review the magistrate judge's recommendation." *Griego v. Padilla*, 64 F.3d 580, 584 (10<sup>th</sup> Cir. 1995). The court has reviewed the record in accordance with this standard, and finds that defendant's objection should be overruled.

The sole issue raised in defendant’s objection is whether the magistrate judge properly found that the Administrative Law Judge (“ALJ”) committed reversible error by failing to make an explicit finding regarding the demands of plaintiff’s past relevant work at step four of the sequential

evaluation process. At step four, the ALJ is required to determine whether the claimant has the residual functional capacity to perform his past work. *See Allen v. Barnhart*, 357 F.3d 1140, 1142 (10<sup>th</sup> Cir. 2004); 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). The Tenth Circuit has identified three phases in the step four process:

In the first phase, the ALJ must evaluate a claimant's physical and mental residual functional capacity (RFC), and in the second phase, he must determine the physical and mental demands of the claimant's past relevant work. In the final phase, the ALJ determines whether the claimant has the ability to meet the job demands found in phase two despite the mental and/or physical limitations found in phase one. At each of these phases, the ALJ must make specific findings.

*Winfrey v. Chater*, 92 F.3d 1017, 1023 (10<sup>th</sup> Cir. 1996) (citations omitted).

In the first phase, the ALJ found that plaintiff had the residual functional capacity to lift and/or carry fifty pounds occasionally and twenty-five pounds frequently<sup>1</sup> (among other activities that are not relevant here). With respect to the second phase, the ALJ implicitly – but not explicitly – held that plaintiff's former job as a laborer required lifting no more than fifty pounds at a time and twenty-five pounds frequently. Based on a hypothetical using these assumptions, the vocational expert testified that plaintiff could do his former job as a laborer. The ALJ then found in the third phase that the vocational expert's testimony was persuasive, and adopted it as his own.

The magistrate judge concluded that although the ALJ adequately inquired into the functional demands of plaintiff's past relevant work, he did not make any specific findings with respect to those requirements. As an example, the magistrate judge noted the ALJ's failure to resolve an ambiguity about how many pounds plaintiff lifted in his previous work as a laborer. Plaintiff testified that he

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<sup>1</sup> The ALJ did not make this finding specifically, but he did state that he concurred with the findings of the state agency physicians, who found that plaintiff could lift and/or carry fifty pounds occasionally and twenty-five pounds frequently.

lifted and carried “about 60, 65 pounds” as a laborer. The vocational expert indicated that a general laborer position was “medium” work from an exertional standpoint, which entails lifting no more than fifty pounds at a time and twenty-five pounds frequently. The ALJ did not acknowledge this discrepancy or seek to resolve it.

Defendant argues that the ALJ properly relied on the vocational expert’s testimony in determining the requirements of plaintiff’s past relevant work as a laborer. According to defendant, the Tenth Circuit has repeatedly expressed its approval of the ALJ’s analysis when the ALJ quotes the vocational expert’s testimony in support of his own findings.

The court does not disagree that the ALJ may rely on the vocational expert’s testimony regarding the exertional requirements of plaintiff’s past relevant work, as long as the ALJ does not delegate the final analysis to the expert. *See, e.g., Doyal v. Barnhart*, 331 F.3d 758, 760-61 (10<sup>th</sup> Cir. 2003); *Gibson v. Barnhart*, 69 Fed. Appx. 983, 985 (10<sup>th</sup> Cir. 2003) (citation omitted). But the issue here is not whether the ALJ was entitled to rely on the vocational expert’s testimony. Rather, the issue is whether the ALJ adequately explained how and why he decided what the requirements of plaintiff’s past relevant work were. He simply stated that he found the vocational expert’s testimony to be persuasive and that he was adopting it. The vocational expert, however, did not discuss whether plaintiff’s particular job as a laborer required lifting a maximum of fifty pounds, or whether a laborer position in the general economy had the fifty-pound lifting limit.<sup>2</sup> And the ALJ did not reference the lifting or carrying requirements at all. Defendant even concedes that “the ALJ may have expressed his reasoning in a more precise manner. . . .” As the magistrate judge observed,

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<sup>2</sup> The context of the vocational expert’s testimony strongly suggests that she was referring to the exertional limitations of a laborer in the general economy, particularly since plaintiff gave minimal information about what he did in his job as a laborer.

“[t]he court may not supply a *post hoc* rationalization for the ALJ’s decision and may not decide the case upon a basis other than that relied upon by the ALJ.” Report and Recommendation (Doc. 16), at 15-16 (citing *Grogan v. Barnhart*, 399 F.3d 1257, 1263 (10<sup>th</sup> Cir. 2005)). The court cannot engage in a meaningful review of the ALJ’s decision if the ALJ does not adequately explain his reasons for reaching the decision. See *Brown v. Comm’r of the Soc. Sec. Adm’n*, 245 F. Supp. 2d 1175, 1187 (D. Kan. 2003). For these reasons, the court finds that the magistrate judge properly concluded that the case should be reversed and remanded.

As a final note, plaintiff filed a brief in support of the magistrate judge’s Report and Recommendation. Plaintiff suggests that this court should overrule defendant’s objection and remand the case based on alternative reasons – (1) that the ALJ engaged in inadequate discussion of the functional demands of plaintiff’s past relevant work, and/or (2) that the ALJ failed to consider all of plaintiff’s physical and mental limitations in assessing his residual functional capacity. The court has already addressed plaintiff’s first argument. With respect to plaintiff’s second argument, the magistrate judge concluded that the ALJ had properly assessed plaintiff’s residual functional capacity.

Although plaintiff did not phrase his second argument as an objection to the magistrate judge’s Report and Recommendation, the court has reviewed the issue in the interest of giving the ALJ proper direction on remand.<sup>3</sup> In analyzing plaintiff’s residual functional capacity, the ALJ thoroughly considered the medical evidence, plaintiff’s testimony and reports to physicians,

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<sup>3</sup> In the event that plaintiff intended his argument to serve as an objection, it was untimely. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); D. Kan. R. 72.1.4. The parties had ten days to serve and file written objections to the Report and Recommendation. Plaintiff’s pleading in which this argument is contained was filed twenty calendar days (fourteen business days) after the magistrate judge filed his Report and Recommendation.

plaintiff's prior use of alcohol, state agency physician assessments, and plaintiff's credibility. The ALJ specifically noted that "superimposed on the claimant's physical complaints is evidence of added psychiatric involvement." This indicates to the court that the ALJ did, in fact, consider all of plaintiff's impairments cumulatively. Moreover, although plaintiff appears to chiefly complain that the ALJ did not properly consider his mental limitations, the ALJ in fact dedicated an entire paragraph to plaintiff's mental limitations and found that plaintiff's "mental limitations have resulted in added slight to moderate limitations of work-related mental functioning, including mild restriction of activities of daily living, mild difficulties in maintaining social functioning, moderate difficulties in maintaining concentration, persistence, and pace." The court finds that, to the extent that plaintiff is objecting to the portion of the magistrate judge's Report and Recommendation which concluded that the ALJ's residual functional capacity assessment was adequate, the objection is overruled.

**IT IS THEREFORE ORDERED** that Defendant's Objection to Magistrate's Report and Recommendation (Doc. 17) is overruled. In accordance with the magistrate judge's Report and Recommendation, the decision of the ALJ is reversed and the case is remanded for further proceedings pursuant to the fourth sentence of 42 U.S.C. § 405(g).

Dated this 28th day of April 2006, at Kansas City, Kansas.

s/ Carlos Murguia  
**CARLOS MURGUIA**  
**United States District Judge**